Supreme Court, U. S.
FILED
JUN 7 1979
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1464

STATE OF ILLINOIS,

Petitioner,

vs.

GENERAL PAVING COMPANY and
F. F. MENGEL COMPANY,

Respondents.

BRIEF OF RESPONDENT GENERAL PAVING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT G. HECKENKAMP
HECKENKAMP AND SIMHAUSER, P.C.
522 East Monroe Street
Springfield, Illinois 62701
Attorneys for Respondent
General Paving Company

SCHNEPP & BARNES PRINTERS, INC., SPRINGFIELD, ILL.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

No. 78-1464

STATE OF ILLINOIS,

Petitioner,

vs.

GENERAL PAVING COMPANY and
F. F. MENGEL COMPANY,

Respondents.

BRIEF OF RESPONDENT GENERAL PAVING COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

It is asserted by Petitioner, as reasons for granting the Writ, that the decision below:

I. RAISES IMPORTANT AND RECURRING QUESTIONS CONCERNING THE ADMINISTRATION OF THE ANTITRUST LAWS AND THE EFFICACY OF THE TREBLE DAMAGE ACTION.

II. CONFLICTS, IN PRINCIPLE, WITH THE RECENT DECISION OF THIS COURT IN *PARK-LANE HOSIERY CO. V. SHORE.*

III. FRUSTRATES THE INTENT OF CONGRESS TO FOSTER THE USE OF PRIOR GOVERNMENT ANTITRUST JUDGMENTS AND IS BASED UPON AN ERRONEOUS APPLICATION OF PRINCIPLES OF STATUTORY CONSTRUCTION.

I.

The policy of encouraging vigorous private enforcement of the antitrust laws is not disrupted by the decision below. Petitioner's argument here is that the exercise of the constitutional right to trial by jury impedes law enforcement. If there is soundness in that argument sufficient for this Court to take cognizance of this matter on certiorari, then our entire system faces revamping.

Moreover, the argument that private litigation is "one of the surest weapons for effective enforcement of the antitrust laws" is self defeating in the case at bar, as it would be in virtually any case where Section 5(a) is invoked, for the predicate for operation of the prima facie rule is a prior judgment in a proceeding brought by or on behalf of the United States that a defendant has violated the antitrust laws. Thus, at that stage, the enforcement is a *feat accompli*. Understandably, none of the cases cited in support of this proposition involve the interpretation of Section 5(a).

The Petitioner then argues that this Court last considered the operation of 5(a) in the Clayton Act 28 years ago, in *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951), and thus there is an absence of an authoritative Supreme Court pronouncement on the application of collateral estoppel in private antitrust actions and therefore the issue is novel.

In the face of the pronouncement by the Supreme Court in *Emich*, and the fact that the operable language of 5(a) has not been changed by Congress (although the antitrust laws have undergone revision a number of times by post-*Emich* Congresses) the novelty lies not in the issue, but in the *presentment* of the issue.

II.

The decision below does not conflict with *Parklane Hosiery Co. v. Shore*, 99 S.Ct. 645, 58 L.Ed. 552. First of all, in *Parklane*, there was no statutory procedural provision in the Securities Act, as in the Clayton Act.

But, apart from that proposition, *Parklane*, after negating mutuality of the parties as a requisite, clearly states that a trial judge should not allow the use of offensive collateral estoppel where (1) the plaintiff could easily have joined in the earlier action, or (2) where the application of offensive collateral estoppel would be unfair to the defendant. (Underscoring added.)

Consideration of the second element appears at paragraph (8)(a) of the opinion (pp. 561-562, 58 L.Ed. 2d.), where the Court said:

> "Still another situation where it might be unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result . . ."

and in footnote (15), the inability of the defendant to engage in full-scale discovery is cited as such a procedural disadvantage.

In the criminal forum, a defendant certainly cannot engage in full-scale discovery as he could in a later civil case. The footnote to *Parklane* goes on to say:

> "Indeed, differences in available procedures may sometimes justify not allowing a prior judgment to have estoppel effect in a subsequent action even between the same parties, or where defensive estoppel is asserted against a plaintiff who has litigated and lost. The problem of unfairness is particularly acute in cases of offensive estoppel, however, because the defendant against whom estoppel is asserted typically will not have chosen the forum in the first action."

Incidentally, Justice Rehnquist's dissent in *Parklane* did not recognize that there was little reason why the Court's decision should not extend to private antitrust cases. Rather, he posed the possibility as a forewarning that the decision *may* extend to other areas in deprivation of defendant's right to jury trial.

III.

The intent of Congress is not frustrated. Whether the Court considers Section 5(a) as it was enacted by the 1914 Congress, or as it exists today, the result is the same. The contention that the 1914 Congress intended one thing (the conclusive presumption) but adopted another (prima facie rule) is a mistaken notion. The *adoption* of the prima facie rule clearly evidenced the intent of Congress. Its motive for adopting it is immaterial.

Likewise mistaken is the notion that Congress never intended to exclude the operation of the common law doctrine of collateral estoppel in antitrust cases. The argument that the original Section 5(a), as it relates to private litigants, has remained unchanged to the present day in spite of proposals to amend to give prior government judgments a conclusive effect in subsequent private actions certainly does not support the State's position in this respect. Indeed, it negates that position.

Nor is there any merit in the proposition that the decision below converts a statute that was intended to benefit private plaintiffs into one which acts as a hindrance to the prosecution of private antitrust actions (Pltf's Pet. p. 21). It is fictious to argue that the *prima facie* rule would deter a legitimate private claimant from prosecuting an antitrust suit, whereas, the same claimant would proceed if the rule were conclusive. Private antitrust plaintiffs already have many advantages over other plaintiffs at common law.

Congress, by its enactment of Section 5(a) as part and parcel of the antitrust laws, has simply pre-empted the area with respect to the effect to be given a prior judgment in a collateral action.

CONCLUSION

Under or apart from the general considerations outlined by Rule 19 of the Supreme Court Rules, the Petition contains no basis or reason for granting the Writ.

Respectfully submitted,

GENERAL PAVING COMPANY, Respondent,
By: Heckenkamp and Simhauser, P.C.
Its Attorneys